



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 4, 1998

Ms. Linda Wiegman
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-2947

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120144.

The Texas Department of Health (the "department") received a request for information relating to Park Place Hospital Medical Center of Port Arthur, Texas. You contend that some of the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the "informer's privilege", various statutes and by rights of privacy. You indicate that you have released all of the information that you do not consider confidential and you have submitted the remaining responsive documents, marked to indicate the information you seek to withhold and the respective exceptions. We have considered the exceptions you claim and have reviewed the information at issue.

We note that the request for information is dated August 17, 1998 and that the department's request for opinion is dated September 15, 1998. Thus, the department failed to request an open records decision from this office within the ten day statutory period as required under Government Code section 552.301. This failure to timely request a decision results in the legal presumption that the requested information is open to the public; only the demonstration of a compelling interest can overcome this presumption. *See Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). By failing to timely submit your request for opinion, you have waived all permissive exceptions to disclosure.

Since the informer's privilege facet of section 552.101 of the Government Code serves to protect the flow of information to a governmental body and does not serve to protect a third person, this privilege, unlike other section 552.101 claims, may be waived by the governmental body. Open Records 549 (1990). The untimely raising of this exception is insufficient to rebut the presumption that the subject information is open to the public. None of the subject information may be withheld on the basis of this exception.

When requested information is deemed confidential by law, a compelling interest sufficient to negate the presumption is presented. *See* Open Records Decision No. 150 (1977). Therefore, a showing that information is made confidential by statute is sufficient to rebut the presumption. Section 552.101 of the Government Code excepts such information from disclosure. You relate that portions of the responsive documents are made confidential by section 5.08 of article 4495b of Vernon's Texas Civil Statutes (the "MPA"). This statute makes medical records (including patient identification numbers) confidential. The statute applies to "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient" and "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." As you relate, some of the information at issue appears to have been obtained from records and communications protected by the MPA. This information is confidential and may generally be disclosed only in accordance with the MPA. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). However, we note that these submitted medical records include HCFA- 2567 forms. Our offices have stated that federal law preempts state law in regard to these documents, and that the department is required to release deidentified HCFA 2567 forms. Open Records Letter No. 97-2843 (1997) (*citing* Open Records Letter Nos. 1514 (1997), 1492 (1997), 1472 (1997), 1388 (1997) and 1230 (1997)). Therefore only patient identifying information may be redacted from these forms, and the remainder released.

You also relate that portions of the responsive documents are made confidential under Health and Safety Code section 611.002. This statute makes confidential, *inter alia*, records of the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by mental health professionals, with exceptions not applicable here. Such records must therefore be withheld.

You further relate that a portion of the responsive information consists of records made confidential by Health and Safety Code section 161.032(a). This statute makes confidential the records and proceedings of "medical committees" other than those records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center or extended care facility. "Medical committee," as defined by Health and Safety Code section 161.031, includes any committee of, among other entities, a hospital, or an extended care facility. The only submitted document that appears to be within the ambit of this statute is the record of a review made by the medical records committee of Quest Hospital. As this report is derived from medical records, release of this information is addressed under our discussion of the Medical Practices Act.

You relate that a portion of the responsive information consists of a report made confidential by section 48.101 of the Human Resources Code. This statute pertains to reports of abuse, neglect, or exploitation of elderly and disabled persons in certain facilities, and reads in pertinent part as follows:

- (a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under . . .
chapter [48 of

the Human Resources Code];

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records,
communications, and working papers used or developed in an
investigation made under this chapter or in providing services
as a result of an investigation.

(b) Confidential information may be disclosed only for a purpose
consistent with this chapter and as provided by department rule
and applicable federal law.

This information is confidential pursuant to section 48.101(a) of the Human Resources Code. *See* Hum. Res. Code § 48.082(a); *see also id.* § 48.002 (definitions). Consequently, it must not be disclosed except for purposes consistent with chapter 48 of the Human Resources Code, or as provided by department rule or federal law. *See id.* § 48.101(b); *but see id.* § 48.101(c), (d), (e), (f) (permitting release of confidential information in certain circumstances). We further agree that none of the provisions permitting release are applicable to the subject information.

Finally, you argue that portions of the responsive information are protected by a right of privacy. Section 552.101 of the Government Code excepts from required public disclosure information that is made confidential by a constitutional or common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). As protections under common-law right of privacy are broader than those afforded constitutionally, we look to the common-law test as articulated by the Texas Supreme Court in the context of requests for disclosure of public information. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* In this case, the requested complaint file contains several such facts which must be withheld.

Although you have not urged section 12.003(a) of the Human Resources Code, the submitted documents include information subject to this statute. Section 12.003(a) of the Human Resources Code forbids the public disclosure of "any information" about the department's clients of assistance programs (including Medicaid), except for purposes directly connected with the administration of those programs. Open Records Decision No. 584 (1991). Therefore, this identifying information must not be released.

You have also not raised section 261.201(a) of the Family Code, although some of the requested information falls in the ambit of this statute. This provision protects reports of the abuse or neglect of children and provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

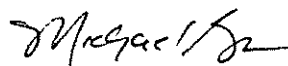
- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Family Code § 261.201(a), *See also* 25 T.A.C. § 1.207 (confidentiality of Family Code § 261.201 investigative process and report). The respective submitted records apparently consist of “files, reports, records, communications, and working papers used or developed in an investigation” under chapter 261 of the Family Code and are thus confidential. *See* Open Records Decision No. 440 at 2 (1986) (applying predecessor statute, holding such items excepted “by its very terms”). The department must withhold these documents from disclosure under section 552.101 of the Government Code.

Consistent with the above discussion, we have marked the information to be withheld from the responsive documents.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 120144

Enclosures: Submitted documents

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